Supreme Court, U.S.
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No. 93-1908

In the Supreme Court of the United States

OCTOBER TERM, 1994

AJITH KUMAR SENANAYAKE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence presented by petitioner would compel a reasonable factfinder to find that petitioner is eligible for asylum.

2. Whether the Board of Immigration Appeals abused its discretion in denying petitioner's application for relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (Supp. IV 1992).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unpublished, but the judgment is noted at 20 F.3d 1171 (Table). The decisions of the Board of Immigration Appeals (Pet. App. 8-16) and the immigration judge (Pet. App. 17-24, 25-33) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1994. The petition for a writ of certiorari was filed on May 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a 38-year-old native and citizen of Sri Lanka who was admitted to this country as a lawful permanent resident on February 19, 1981, on the basis of his marriage to a United States citizen. A.R. 69-70, 117, 146, 190, 211, 239, 240, 253, 255, 262, 289.[1] On November 6, 1981, he pleaded guilty in the United States District Court for the Middle District of Louisiana to conspiracy to possess opium with the intent to distribute it. He was sentenced to ten years' imprisonment. A.R. 271.[2] An order to show cause (A.R. 217) was issued on June 16, 1982, charging that petitioner is deportable under Section 241(a)(11) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1251(a)(11), on the basis of that conviction. At a deportation proceeding conducted in New Orleans on August 24, 1988, petitioner's attorney, acting on his behalf, admitted the show cause allegations and conceded deportability, but requested asylum, withholding of deportation, and discretionary relief under Section 212(c) of the Act. A.R. 115-116.[3] An evidentiary hearing (A.R. 117-144) was conducted on his Sec-

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[1] "A.R." refers to the certified administrative record filed in the court of appeals.

[2] Three other counts were dismissed at that time on the government's motion. A.R. 271. Petitioner's FBI identification sheet shows that he was arrested on July 27, 1981, and charged with distribution of opium, distribution of hashish-marijuana, and conspiracy. A.R. 291.

[3] Section 212(c) provides that "[a]liens lawfully admitted for permanent residence who [have maintained] a lawful unrelinquished domicile [in the United States] for seven consecutive years may be admitted in the discretion of the Attorney General without regard to their [deportability under other sections of the Act]." 8 U.S.C. 1182(c) (Supp. IV 1992).

tion 212(c) application, which was already on file (A.R. 211-213).

1. a. In support of his Section 212(c) application, petitioner testified that he lived with his wife for two years prior to his incarceration (A.R. 118-119), but that at the time of the hearing he was separated from her and had no desire to end the separation because he felt that she did not offer him moral support while he was in prison. A.R. 120. As a result of the marriage, he has a son who is a United States citizen and was eight years old at the time of the hearing. A.R. 119, 200. Petitioner sees his son once a month (A.R. 121, 130), but cannot take him out of the house because his wife fears that they will not return (A.R. 131). Petitioner does not pay child support, but claims that he buys the child clothing on each occasion that he visits. A.R. 121-122, 130.[4] He said that he was employed while in prison as an accountant for Federal Prison Industries and was self-employed at the time of the hearing as a gem cutter and gemstone broker. A.R. 122, 125, 134. Petitioner owns no property in this country (A.R. 135),[5] and acknowledged that he has performed no community service (A.R. 133).

According to petitioner, he pleaded guilty only because his attorney told him that, being "the least culpable out of everybody that was involved," he would probably get

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[4] His only other relatives in this country are his mother and a sister, who are lawful permanent residents of the United States living in Kansas City. A.R. 123, 130. Petitioner says he visits them every three or four months and is "sometimes" visited by them. A.R. 130. He has a brother, sisters and "some relatives" who still live in Sri Lanka. A.R. 134-135.

[5] At the time of the hearing, petitioner was living in a rented apartment, one of five different locations in Baton Rouge, Louisiana, at which he resided after being released from prison. A.R. 132-133.

probation; petitioner asserted that he would not have pleaded guilty without that assurance "[b]ecause I didn't deserve the time I did." A.R. 128-129.[6] He claimed to have committed only one minor rules violation while in prison, and said that he was released on parole (which he was still on at the time of the hearing) after serving "the minimum" three years and four months. A.R. 125-126.

b. After reviewing "the entire record," the immigration judge denied Section 212(c) relief because "the good factors" were "outweigh[ed]" by "the negative factors concerning the offense and its nature and seriousness." Pet. App. 23. The ten-year sentence that petitioner received, the judge concluded, evidenced that he was convicted of "a very serious offense," which he committed at a mature age when he "should have known the consequences." *Id.* at 22-23.[7] Consequently, the judge found that the demonstration of "some unusual or outstanding equities" was required. *Id.* at 24. "[U]pon

[6] The attorney who represented petitioner in the criminal case was deceased at the time of the immigration court hearing. A.R. 127. Another attorney testified that his assistance in attempting to reverse the sentence was solicited by that attorney, who felt that petitioner "had been given a pretty bad deal, considering his involvement." After being informed by the sentencing judge that the judge had imposed a lengthy sentence because of his belief at the time that petitioner "was involved in the drug dealing intimately," the second attorney said that he interviewed the co-defendants and was "assured" by them that petitioner's role "was extremely minimal." He added that the judge, when provided with this information, said that he had lost jurisdiction over the case but "would be cooperative" in supporting a parole request. A.R. 138-139.

[7] The judge took note of the testimony concerning what petitioner had allegedly been told by his attorney in the criminal case prior to his guilty plea, but observed that the attorney, being deceased, was not available. Pet. App. 20.

review of the entire case," however, the judge could not "find that there are any [equities] that deserve discretionary relief." *Ibid.* Although petitioner had "a history of employment" and his family ties were favorable factors, the judge noted that he was already separated from his wife and that the hardship that would result from separation from his child and mother (which, the judge observed, "anyone would suffer") did "not appear" to be so severe as to "be unbearable." *Id.* at 22-23. The judge therefore concluded that deportation would not cause petitioner "unusual hardship." *Id.* at 23.

2. a. Petitioner's asylum application (A.R. 146-149) and its addendum (A.R. 151-155) were submitted on September 22, 1988, and the evidentiary hearing on it (A.R. 67-99) was conducted on December 1, 1988.[8] Petitioner's claim was that both his family connections and his own activities placed him at risk of being killed by communist and Tamil rebels if he returned to Sri Lanka. He testified that since Sri Lankan independence, his family had been "[v]ery strongly" associated with the United National Party, the governing political group, and that his father, who had been a member of parliament between 1948 and 1965, had been poisoned and killed by the JVP (the Sinhalese acronym for the People's Freedom Party), a communist terrorist group that he said was "closely associated" with Tamils, while campaigning in 1969 to

[8] Under Section 208 of the Act, the Attorney General may, in her discretion, grant asylum to an alien if the Attorney General determines that the alien is a "refugee." 8 U.S.C. 1158. Under Section 101(a)(42), a "refugee" is a person who has demonstrated an inability to return to the person's native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42).

return to parliament. A.R. 71-74.[9] Petitioner added that, while serving as vice president between 1969 and 1972 of a group of college students that secretly informed on JVP members, he (petitioner) had given information about "one of the top three" JVP leaders who, as a consequence, was arrested by soldiers and shot. A.R. 75-77. Petitioner expressed the belief that the JVP knew that he was responsible because "the terrorists know everybody who does what" (A.R. 88-89) and his family received "constant" telephonic threats that he would be killed if they ever encountered him (A.R. 77).

Petitioner claimed that the JVP had taken two specific actions against him in 1972. He was shot at, he said, while riding with a friend in the latter's van, and he believed that the shots were fired by communists "because at that time they were right there" and they attacked a police station "[t]he same * * * evening." A.R. 79. Petitioner also testified that he and a friend, while hunting, were taken captive by the JVP and brought to a camp in the forest, but that after being held in roofless bamboo cages for about three to five days and questioned under torture (A.R. 81-83, 86), they were able to escape when the police, alerted by friends who knew he was missing, came and surrounded the camp (A.R. 83).[10]

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[9] Petitioner believed that the JVP was responsible because his father's United National Party was "firmly against" the communists. A.R. 74. Testifying on his behalf, his mother also asserted that the JVP had poisoned and killed her husband, but she acknowledged that nobody was ever arrested for the deed "because we couldn't actually say the exact person." A.R. 92, 96.

[10] Petitioner testified that his captors simply questioned him about such matters as his uncle's plans and "did not torture [him] as much" because, coming from a politically well-connected family, they wanted to keep him as long as they could and would have killed him only if he had refused to answer questions. A.R. 82, 85.

Petitioner acknowledged that nothing happened to him between the time that he escaped until he departed Sri Lanka in 1974 as a member of the merchant marine. However, petitioner claimed that all the terrorists "were hiding" during that period, that "now [the terrorists] have a lot of power," and that he had joined the merchant marine because he "always knew they were going to come back." A.R. 87.[11] Petitioner also acknowledged that his sisters who still live in Sri Lanka "are doing okay." A.R. 89.[12]

b. The immigration judge concluded that petitioner had not suffered past persecution (A.R. 64) and found that a "reasonable person in [his] shoes would not fear [future] persecution" (A.R. 65). Noting that the 1987 State Department human rights report indicated that the current civil war in Sri Lanka was "mostly between the Tamils and the ruling party" and mentioned the JVP only to say that it was "prohibited from existing" (A.R. 63-64), the judge observed that, "without further testimony and proof," a case for asylum and withholding eligibility "would certainly not [be] establish[ed]" by an individual's political activity "years ago" (A.R. 65). The immigration judge also noted the lack of incidents while petitioner remained in Sri Lanka "for approximately 18 months to two years after the kidnapping" (A.R. 63), lack

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[11] According to petitioner, in 1972 the prime minister "gave them 24 hours to hide or surrender," but the president who assumed power in 1976 (a United National Party member, see A.R. 72) "released all the terrorist leaders and they regrouped again" (A.R. 86-87). Petitioner's mother acknowledged, however, that there is still a prohibition against JVP activity. A.R. 96.

[12] Although neither petitioner nor his mother had received recent word from his brother, a police officer (A.R. 94), neither made any assertion that the brother had been the victim of foul play. A.R. 64, 89, 94.

of evidence that the shooting incident was not "an innocent gunshot" or that the driver of the van was not the intended victim (A.R. 62-63), and lack of allegations that any harm had befallen petitioner's sisters or policeman brother (A.R. 64). The judge therefore concluded that petitioner had "failed to show that he has been persecuted in the past and that he has any reason [to fear] persecution in the future." A.R. 64-65.

3. After *de novo* consideration of petitioner's asylum and Section 212(c) claims, the Board of Immigration Appeals held that he had failed to establish eligibility for asylum (Pet. App. 12) and did not merit a discretionary grant of Section 212(c) relief (Pet. App. 16). With respect to the asylum claim, the Board found, "[a]ssuming, *arguendo*, that the JVP targeted [petitioner] in 1972 on account of his political opinion," that he had "not made the required showing that the Sri Lankan Government was either unwilling or unable to protect him from that faction." *Id.* at 12.[13] In this regard, the Board noted that government security forces "succeeded in tracing him following his abduction and that they enabled him to escape by attacking the JVP base"; and, citing its observation "in a recent precedent decision" that the government "has brutally suppressed the JVP," the Board found that petitioner "failed to offer any background documentation to support his allegation that the JVP has regained sufficient power so as to be able to search out individuals in circumstances similar to his own." *Id.* at 12-13. Finally, the Board found that petitioner "failed

[13] If an applicant for asylum fears persecution by a particular group rather than the government, the applicant must demonstrate that the group is one that "the government is unable or unwilling to control." *Adebisi* v. *INS*, 952 F.2d 910, 914 (5th Cir. 1992).

to offer any persuasive evidence that Tamil militants ever attempted to seek retribution" for his having informed on their comrades during his college days or "were even aware of his activities." *Id.* at 13 n.2.

With respect to petitioner's Section 212(c) application, the Board concluded that "the negative factors outweigh the favorable equities in his case," and that petitioner consequently "does not merit" a discretionary grant of relief. Pet. App. 16. While finding that, "[o]n a cumulative basis," his equities "rise to the level of the unusual and outstanding,"[14] the Board viewed his drug trafficking conviction as "a grave offense," noted that he was arrested "only some [five] months after being granted lawful permanent resident status," and observed that, while petitioner "has sought to minimize his role in the conspiracy," it could not "ignore the fact that the United States district court judge who presided over the criminal proceedings saw fit to impose a stern [ten]-year prison sentence." *Id.* at 15-16.

4. The court of appeals affirmed both aspects of the Board's decision. The court relied on this Court's decision in *INS* v. *Elias-Zacarias*, 112 S. Ct. 812, 817 (1992), which held that, to obtain reversal of a denial of

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[14] The Board noted the following equities: that petitioner has lived in this country since 1978 and has been a lawful permanent resident since 1981; that, while the "weight" of his United States citizen wife as an equity is "undercut" by their separation, "strong family ties" are provided by his United States citizen child and lawful permanent resident mother and sister; that he has "a history of employment" and "owns an interest in a gem business"; that he "appears to have served his prison sentence without incident," was "employed during his confinement," and "has abided by the terms of his parole"; and that, while he failed to make a case for asylum, his native country "is currently embroiled in a civil war." Pet. App. 14-15.

asylum, an applicant "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." Pet. App. 3. The court concluded that petitioner "did not sustain [that] burden." *Id.* at 5.[15] In addition, the court acknowledged the Board's consideration of petitioner's positive equities and its conclusion that they were nevertheless outweighed by his conviction for what his "stern [ten]-year prison sentence" evidenced was a "grave offense" committed five months after being granted lawful permanent resident status. *Id.* at 5-6. The court of appeals held that, because the equities were "adequately considered" and balanced against the adverse factors, the Board "did not abuse its discretion" in denying petitioner Section 212(c) relief. Pet. App. 6-7.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly found that there was no basis for disturbing the Board's decision that petitioner failed to establish his eligibility for asylum. Under *INS* v. *Elias-Zacarias*, 112 S. Ct. 812 (1992), a

[15] In reaching that conclusion, the court of appeals took note of the Board's observation that government forces were able to effectuate petitioner's escape from his kidnappers, his admission that he had "no further problems" during the time he remained in Sri Lanka after his escape, his concession that no harm had befallen his three sisters who remain in Sri Lanka, and the Board's finding that he had offered no evidence to support his allegation that the JVP had regained sufficient power to search out and harm its opponents. Pet. App. 4-5.

Board determination that asylum eligibility was not established is subject to reversal by the court of appeals only if the applicant's evidence is so compelling that no reasonable factfinder could fail to find that eligibility was established. *Id.* at 817.

Contrary to petitioner's assertion that his evidence met that test (Pet. 11), the court of appeals correctly concluded that it did not. The Board acted well within its discretion in concluding that petitioner did not establish his eligibility for asylum. Although petitioner had been kidnapped in Sri Lanka in 1972, government forces had been able to effectuate petitioner's escape. See *Adebisi* v. *INS*, 952 F.2d 910, 914 (5th Cir. 1992). Petitioner admitted that he had "no further problems" during the time he remained in Sri Lanka after that escape, and conceded that no harm had befalien his three sisters who remain in Sri Lanka. Finally, petitioner offered no evidence to support his allegation that the JVP had regained sufficient power to search out and harm its opponents. Pet. App. 4-5. Based on those facts, a reasonable factfinder could conclude that petitioner's eligibility for asylum was not established.

2. Judicial review of the Board's Section 212(c) denials is "extraordinarily narrow." *Akrap* v. *INS*, 966 F.2d 267, 271 (7th Cir. 1992). An abuse of discretion may be found only if the Board's decision "was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis" such as invidious discrimination against a particular race or group. *Hazzard* v. *INS*, 951 F.2d 435, 438 (1st Cir. 1991); *Cordoba-Chaves* v. *INS*, 946 F.2d 1244, 1246 (7th Cir. 1991); *Joseph* v. *INS*, 909 F.2d 605, 607 (1st Cir. 1990); see also *Ayala-Chavez* v. *INS*, 944 F.2d 638, 642 (9th Cir. 1991) (discretion is abused "only if the Board failed to

support its conclusions with a reasoned explanation based upon legitimate concerns").

In this case, the court of appeals properly concluded that the Board adequately considered petitioner's positive equities and did not abuse its discretion by determining that they were insufficient to outweigh his conviction for an offense the seriousness of which was shown by the ten-year sentence he received. See *Cordoba-Chaves*, 946 F.2d at 1247 ("where the adverse factors are very serious, a favorable exercise of discretion may not be warranted even though the equities are outstanding") (citing *In re Edwards*, Int. Dec. No. 3134 (B.I.A. May 2, 1990), slip op. 7); *Ghassan* v. *INS*, 972 F.2d 631, 636 (5th Cir. 1992) (Board "legitimately could conclude" that conviction of "extremely serious" narcotics offense "tipped the scales" against equities that included rehabilitation), cert. denied, 113 S. Ct. 1412 (1993).[16]

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[16] While petitioner continues to assert (Pet. 17) that the immigration judge failed to consider petitioner's claims that he "was not advised by his criminal counsel regarding the immigration consequences of pleading guilty" and that "his involvement in the conspiracy" was exaggerated, the court of appeals correctly observed that "[t]he Board's decision reflects that it considered th[o]se factors." Pet. App. 7 n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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